Defining Corruption: Plunkitt to Buckley and Beyond

Ron Schmidt, Jr.
Institute of Governmental Studies,
University of California, Berkeley

Working Paper 95-20

IGS
INSTITUTE OF
GOVERNMENTAL
STUDIES

UNIVERSITY OF CALIFORNIA AT BERKELEY

Defining Corruption:
Plunkitt to Buckley and Beyond

Ron Schmidt, Jr.
Institute of Governmental Studies,
University of California, Berkeley

Working Paper 95-20

Ron Schmidt, Jr.
UC Berkeley

DEFINING CORRUPTION: PLUNKITT TO BUCKLEY AND BEYOND

"Dianne Feinstein serves special interests", claimed a 1994 campaign ad for Senate-candidate Michael Huffington, "...and her own." Contemporary political language such as this often centers around a concern for the ways in which "interests", special and otherwise, "corrupt" the American political process. Much of the writing about this corruption follows the implication of this advertisement for the Huffington campaign. The argument seems to be that players on the political scene are acting out of a desire to achieve particular ends for themselves or for particular and discrete communities, rather than for some general worthy end. This argument conflates the term "corruption" with a particular motive for public action. "Corruption", however, is a descriptive term. For political corruption to take place, some "pure" model of politics has to have degenerated. If one's model of politics is a system where individuals and groups attempt to achieve a variety of ends for many different motives which include but are not limited to self-interest, then Dianne Feinstein's willingness to pursue her own interests cannot be called "corrupt". Much of the writing

about political corruption does not include a model of "pure" politics, however. This has more than grammatical consequences. Much of the writing on the need for governmental reform in "good government" literature, conservative literature, and in several Supreme Court decisions inclines to disrupt legitimate political action in order to stave off the appearance or reality of what they deem "corruption". Although one can definitely point to certain types of political action which are illegitimate, the current use of the term "corruption" is far too vague. In this paper, I conduct a literature review, analyzing writings and judgments on corruption in an attempt to draw a clear division between corruption and political activity between citizens who may not be "angels", but who are not acting in an illegitimate manner.

I

I will begin by letting the Supreme Court raise my concern. In Buckley v Valeo, on the question of attempts to reform corruption, the decision states

> In its efforts to be all-inclusive, however, the provision raises serious problems of vagueness, particularly treacherous where, as here, the violation of its terms carries criminal penalties and fear of incurring these sanctions may deter those who seek to exercise protected First Amendment rights (424 U.S. 1 [1975]).

How can measures be taken to deal with political corruption without encroaching on protected rights? There is no simple resolution to this problem, but one must start with a clear picture of what sort of political system one wishes to preserve from corruption. The Oxford English Dictionary definition of corruption implies that something has been rendered impure, has decayed or degenerated, has "fallen away" from a pure state. What is the pure state of American politics that we can judge political corruption by?

To begin with a clear sense of what American politics is "supposed" to look like, let us begin at the beginning; The Federalist Papers. "[T]he first object of government", wrote Madison in Federalist 10, is the protection of the diverse faculties of mankind. In the very diversity of these faculties, Madison detected the different opinions and interests which would give rise to faction. The Federalist does not laud faction, precisely, but it does not hope to be able to create a nation which can be free of it. The multiplicity of different interests pursuing different ends which concerns contemporary critics like Huffington was assumed by Madison:

> A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments

> and views. The regulation of these various and interfering interests forms the principal task of modern legislation and involves the spirit of party and faction in the necessary and ordinary operations of government.

In any such situation, representatives will at least occasionally find themselves voting on decisions in which they belong to some of the concerned interests. A representative from a rural area will have to decide whether to allocate funds to rural areas; someone connected with manufacturing will decide issues which pertain to manufacturing. "No man is allowed to be a judge in his own cause", Madison writes, "because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity". It is the size of the American republic which saves it from the corrupt state this suggests. In a nation of thousands of factions, one may pursue special interests, even one's own interests, without always winning. Majorities would not long remain the same, no interest would win every time. Thus different interests within the republic would effect policy at different times, achieving the end of representation without succumbing to a change into a different form of government.[1]

---

[1] Following Aristotle's cycle of different governments, a corrupted republic in which one group made policy based on its own interests consistently to the detriment of other groups' would cease to be a republic at all. A republic corrupted by mob

Robert Dahl, in his Preface to Democratic Theory, expands on Madison's model. "In American politics, as in all other societies", Dahl writes,

> control over decisions is unevenly distributed; neither individuals nor groups are political equals. When I say that a group is heard "effectively" ... I mean that one or more officials are not only ready to listen to the noise, but expect to suffer in some significant way if they do not placate the group ... Thus the making of governmental decisions is ... the steady appeasement of relatively small groups (A Preface To Democratic Theory, Dahl; pp. 145-146)

rather than the steady consensus of great majorities. It is when one or some other small number of these small groups are unilaterally appeased or when comparable small groups are never heard effectively that we can say "corruption" takes place. The latter has happened in matters of race or gender; Madison noted that "the most common and durable source of factions has been the verious and unequal distribution of property" and the possibility of this source of faction "corrupting" American politics will take up much of this essay, particularly in regard to whether or not the unequal distribution of property can effectively bar certain groups from the public arena, from being "effectively heard". This

---

rule would become anarchy; one corrupted by the consistent rule of one portion of the population would become oligarchy.

definition of corruption is explicitly formal. As Madison noted in Federalist 51, "what is government itself but the greatest of all reflections on human nature? If all men were angels, no government would be necessary." I will define political corruption, then, as a decay in the process of effective hearing among diverse factions in a large republic, and not concern myself with the relative virtue of different elements of American society.

Now that I have a working definition of the American political system in its "pure" definition, I must turn to a definition of American political corruption; Bruce Cain's "Can Campaign Finance Reform Create A More Ethical Political Process?" is very helpful in laying this definition out. Cain stresses the importance of thinking about corruption in terms of equity among groups, in terms of "an explicit political theory about the proper processes and outcomes of a democratic government." In order to analyze the recent uses of the term "corruption" then, I must check to see whether the American republic is working as it should relative to the factions which make it up, or whether certain factions are unfairly advantaged or shut out. My next question, then becomes: Do "good government" literature, conservative writing, or Supreme Court cases recognize this model of American politics? Are movements for the reform of American politics concerned with

facilitating the interplay of factions and interests, as Federalist 10, Dahl, and Cain seem to suggest, or with removing the unvirtuous element of "self-interest" from the public realm, as the Huffington ad and hundreds of ads, editorials, and essays demand? The answer, at this stage, is "both", and in the next section, I must try to delineate these different attempts at defining and reforming corruption.

II

Court cases dealing with corruption are plentiful and almost as open to differing opinions as the citizenry Madison described in Federalist 10. I will start then, with judgments related to what appears to be a clear example of political corruption: bribery. Bribery ostensibly lies at the center of the Supreme Court's definition of corruption, and therefore of one of the definitions which I will be looking at. The direct exchange of money or goods in a private capacity for political favors is defined as criminal. Federal statute 18 U.S.C. s. 201 subsection (b) defines bribery thusly:

> (b) Whoever --
> (1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official ... or offers or promises any public official ... to give anything of value to any other person or any other person or entity, with intent --
> (A) to influence any official act; or

(B) to influence such public official ... to commit ... any fraud on the United States; or

(C) to induce such public official ... to do or omit to do any act in violation of the lawful duty of such official...

To a certain degree, of course, by incorporating the phrase "corruptly gives", the statute begs the question. Clearly, however, "bribery" assumes that private gifts are given to public officials on the assumption that their actions will be influenced thereby. The gifts are presented with what we might call a corrupt intent to circumvent "proper processes and outcomes of a democratic government."

Subsection (b) goes on to define acceptance of a bribe in the following fashion:

(2) being a public official ... directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in his performance of any official act;

(B) being influenced to commit ... any fraud ... on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official ... [2].

The government statute defining bribery here relies upon an ability to determine the intentions of the person involved, and on a characterization of that intent as corrupt. Once again, the nature

---

[2] all excerpts from 18 U.S.C. s. 201 subsection (b) quoted in Lowenstien.

of "corrupt action" is not defined. If bribery is really to stand as a clear example of corrupt behavior, it shall have to be more clearly defined than this.

In United States v. Brewster, Circuit Judge Wilkey attempted to "illuminate the obscure" definitions provided in section 201. The defendant Daniel B. Brewster, a former U.S. Senator from Maryland, had been charged with receiving money which he knew was in exchange for future influence over his actions. The judge in the original case had failed to make the charges clear to the jury, Wilkey argued, and he (Wilkey) set forth to correct the error:

> An official act means, among other things, any decision or action or any question or matter which may at any time be pending before any public official in his official capacity or place of trust as a Senator.
>
> To do an act corruptly means to do it voluntarily and with a bad or evil purpose to accomplish an unlawful result.
>
> Whether defendant Brewster did in fact undertake the acts for which the bribe was given is immaterial. (506 F.2d 62 [D.C. Cir. 1974])

But relying upon a knowledge of the evil intent of a defendant still leaves the court upon shaky ground, as Wilkey acknowledges. Even if we assume that "bad or evil" implies a "knowing and willful" disposition to break the law and not a general appraisal of the defendant's moral health, how can we separate the

defendant's knowledge of the advantages of his actions in this instance from more general political activity?

It was a perceived threat to normal political action which could be wrongfully characterized as corrupt which prompted this attempt to clearly define "corruption" in the first place. Even in so clear an example as bribery, however, the line dividing criminal and political activity becomes vague[3]. As Wilkey put it,

> More importantly, since "willfully and knowingly" could mean that defendant Brewster knew when he accepted the money that he was receiving the contribution because of his record of performance in this field of postal legislation, and that if he continued such legislative actions in the future (particularly the near future) he would likely receive further contributions, how does this instruction distinguish the contribution found to be illegal here from perfectly legitimate contribution? No politician who knows the identity and business interests of his campaign contributors is ever completely devoid of knowledge as to the inspiration behind the donation.

This is not meant to suggest that normal relationships between elected officials and their contributors are illegitimate, but rather to illustrate the dangerous vagueness of concepts of "corrupt intent", even in cases as "straightforward" as this one.

---

[3] Although not as vague as it was to become later. In Brown v Hartlage [456 U.S. 45 (1982)], the court raised the question of whether promises to voters actually constituted bribes.

It also provided an introduction to questions of corruption in the even murkier field of campaign finance.

In his 1985 article "Political Bribery and the Intermediate Theory of Politics", Daniel Lowenstein attempts to draw a clear legal definition of political bribery by concentrating on the concept of corrupt intent.[4] Lowenstein reiterates many of the problems which we have seen in the Brewster case, including the "greyness of behavior" which distinguishes bribery from certain normal political activity (such as promises to voters; see Brown v. Hartlage). He does not, however, urge a removal to firmer ground. On the contrary, Lowenstein recommends an emphasis on the normative and intention-based aspects of our definitions of political corruption.

> The element of corrupt intent requires that the facts described [of bribery statutes] be subject to characterization as wrongful, and thus requires the application, implicitly or explicitly, of normative political standards.

---

[4] Excerpts from this article appear as "Legal Efforts to Define Political Bribery" in Heidenheimer, Johnston, and LeVine's Political Corruption: A Handbook (1989). Heidenheimer et al attempt to provide a clear definition of political corruption by providing an extensive number of articles with a comparative perspective. Although not much of the book is devoted to the United States per se, Heidenheimer insists upon the usefulness of a "cross-cultural" analysis of corruption for students of political science. The book never arrives at a single definition for the American case.

Lowenstein proceeds by trying to fix a specific normative meaning to "corruption."

Finding that definitions which rely upon a concept of "public opinion" are overly vague, and rejecting "legally-based" definitions (such as James Scott's) for begging the question, Lowenstein turns to a definition of corruption based upon the idea of "harm to the public interest". According to Lowenstein, this follows from the very definition of the word. "Corruption", he tells us, implies a descriptive and a normative picture: "The word's very function is to group together actions and situations that generally have a certain descriptive character and that are regarded as seriously wrong." Although all politicians may know what actions will please certain of their constituents, the decision to act in a certain way in one's official capacity because of monetary considerations is clearly "wrong" and will damage the public interest.

This hardly clears up the situation. If the vagueness of "corrupt intent" was a problem to begin with, the problem is not resolved by pushing the definition to an even further remove. It is difficult to define "corruption", and "bribery" is not very helpful in settling that definition. It is difficult to define "bribery", and "corrupt intent" is not very helpful in settling

that definition. Basing a definition of "corruption" upon the concept "public interest" proves equally frustrating. "Public interest" seems to be grounded in a concept of the legitimate functioning of the political system.[5] Although one might be inclined to agree that the preservation of traditional forms of political action is a good thing, it is unclear why legislating or making legal judgments on the basis of a normative standard of "wrongful" behavior will ease that preservation. Lowenstein provides no data to demonstrate "public interest" behavior. If we are to be concerned with general legitimacy, are we not still concerned with the public opinion standards which he previously rejected? If we are going to stand outside the sphere in which politicians try to appeal to their constituents' sense of legitimate and appropriate behavior, what definition of public

---

[5] "To the extent that policies frequently are formed by processes contrary to the processes sanctioned by the overall political system, the system may break down. If we agree that the system as a whole is preferable to a breakdown of the system, it would then follow that actions seeking to influence policies in ways endangering the system are contrary to the public interest..." Granted, but why are those actions "corrupt" rather than "dangerous"? The terms are hardly synonymous. Is Lowenstein holding up "the political system" as a pure model by which we can judge decay? If so, this conflicts with some of his other works on this topic (see esp. "On Campaign Finance Reform: The Root of All Evil is Deeply Rooted").

interest are we to stand on? Lowenstein appears to have succeeded in adding one more vague term which needs to be broken down (not, thankfully, in this paper).

Bruce Cain, in his article "Can Campaign Finance Reform Create a More Ethical Political Process?" helps to clarify many of these questions at the same time that he raises another. Cain begins his argument by calling into question some of the reasons why we consider bribery to be "bad" in the first place. One major rationale, firmly grounded in the OED definition of "corruption", is that the duties of the political representative are consciously neglected and that the representative relationship itself decays or "falls away" from what it should be. Cain finds this definition questionable for a number of reasons. Firstly, the United States is not premised solely upon a model of "majority rule" direct representation. As we saw earlier in Madison and Dahl, the political system is more like a process of appeasement and compromise between various groups and minorities. Even if a representative is following the will of a small set of constituents rather than the will of the majority, we cannot call this "corrupt" in a strict sense without actually calling into question the system which is our model of normality. "A political world without exchange may be some philosopher's utopian ideal, [or the ideal of

certain candidates for office] but it is not widely accepted in the U.S. tradition" (Cain 5).

Secondly, and also premised upon the traditional American political system which we saw at the beginning of the paper, Cain questions the usefulness of intent for a definition of corruption. As we have seen,[6] there are certain practical problems with a crime based upon a defendant's status as "knowingly and willingly" committing a wrongful deed. Cain raises another, theoretical, problem:

> A person acts corruptly, it is thought, when he or she performs a public function in exchange for private gain. But is the quid pro quo by itself really the unethical aspect of the act? I think not. Unless one holds that public acts should be performed for nonself-interested motives only, then we must allow that "quid pro quo" relationships are common, and maybe even central, to democratic government. Representatives are controlled by voters precisely because they are motivated by the need to get votes (Cain 4).

Traditional American norms of political action are based upon processes of bargaining, compromise, and interested behavior. If we want to consider the arguments of legitimate political systems which Lowenstein raised, or if we want to consider the protection

---

[6] See US v Brewster

of First Amendment rights which might have the "appearance of corruption" to some, we must keep these distinctions which Cain is making in mind.

For his definition of the corrupt element in bribery, Cain turns to questions of politics. The real problem with bribery, he argues, is not an ethical breach but a practical recognition of political and social inequalities:

> Given that the thrust of democratic reform in the twentieth century has been to make individuals more, not less, equal, with respect to their voice in government ... limiting the power of money is a natural extension of the impulse towards equity ... Bribery thus violates political equity (Cain 13).

A discussion of corruption which is based upon bribery, then, is missing the larger point. One can ask if the model of groups interacting in the public sphere is corrupted when palpable inequalities bar certain groups from entrance into the political world. But before one can consider practical possibilities of reform, one must be clear about the differences between corruption and the political activity which one wishes to ensure for all. "All forms of political exchange are bribery of a sort. We need to decide which forms of bribery are permissible and which are not ... We may want to limit campaign contributions, but the reason for doing so is to redistribute political power" (Cain 9). If all

politics involves bribery of a sort, how can we define corrupt political activity? If one concentrates on "the political system" one recognizes that certain examples of political inequality could fall away from the pluralist model. Cain's model of "pure bribery" at least, can provide us with a clear picture of the corruption of the Madisonian model.[7]

This concept of corruption -- a "falling away" from the Madisonian ideal of political relationships among interested groups who have a constitutionally bounded space to interact in -- explicitly gets us away from the problems of political intent or vague concepts of public opinion and public interest. It is less vague than the definitions in 201, Brewster, or Lowenstein. I will now turn to some specific cases that appeared before the Supreme Court to see if my use of the word "corruption" sheds any light on questions of legitimate politics and a "pure" model of American political life.

---

[7] Cain 8: "Our objection to the pure bribe was that the private consumption of money was such a powerful motive that it had to be regulated in the interests of equality. Money used strictly to get elected is on a more even footing with votes, volunteering time, and other forms of political resources." The second use of money fits into the sphere of unequal but legitimate interaction of groups described by Dahl. The rest goes too far to maintain specifically political relationships. The problem lies in distinguishing the two.

III

Buckley v Valeo (424 U.S. I [1975]) deals extensively with the question of money's influence in politics and with the concept of corruption. Although it makes some use of the concept of bribery, it goes beyond it into questions of campaign finance in general.[8] The court does begin its discussion by specifically referring to American "general principles":

> Thus, the questions presented here go to ... whether the specific legislation that Congress has enacted interferes with First Amendment freedoms or invidiously discriminates against nonincumbent candidates and minor parties in contravention of the Fifth Amendment ... The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people" ... "there is practically universal agreement that a major purpose of [the] Amendment was to protect the free discussion of governmental affairs ... of course [including] discussions of candidates ..." The First Amendment protects political associations as well as political expression ... "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."

The court questions whether legislative controls on campaign contributions and expenditures require too great a price on First

---

[8] "But laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action."

Amendment freedoms merely for the sake of casting the "light of publicity" on campaigns to avoid corruption or the appearance of corruption.

Does all this beg the question? Not if we maintain a concept of corruption based upon the capacity of groups to interact in the public arena. The Court looks at corruption as one factor among many which must be considered in the realm of political trade-offs. On the one hand, the public realm can be well-served by this attempt at political reform. It is important that the public have political information so that they may "place each candidate in the political spectrum". It also is likely that criminal activity will be curtailed by open scrutiny. On the other hand, the Court worries that central political rights and activities will also be curtailed by the legislation in question. The Court draws the division between campaign contributions and campaign expenditures. While the Court defines expenditures as forms of speech protected by the First Amendment, contributions are "general", "undifferentiated", "symbolic", "rough" indications of associational preferences. Although the Court wants to restrict corruption, then, it will not impinge on the "free speech" involved in campaign expenditures to do so.

Some critics (Martin Shapiro, for one) have questioned the usefulness of this division. Perhaps we should look at it more closely. In modern society, the Court argued, a candidate needed to spend relatively large sums of money to afford the necessities of mass media. Exposure through the media served the aforementioned goal of shedding the light of publicity on candidates and also allowed the candidate's speech to reach a significant portion of the electorate. Campaign expenditures could serve the speech of the candidate and the need for information on the part of the voter. Contributions, however, despite their associational benefit, opened the door to corruption or the appearance of corruption. Large amounts of money in the political arena, it was argued, could corrupt the actions of elected officials. The Court moved beyond the direct "knowing and willing" quid pro of the bribery statutes here to a more general concern for the effects of money in the political arena.

The Court explicitly states such concerns in National Bank of Boston v. Bellotti. In a discussion of the Federal Corrupt Practices Act, the majority opinion stated:

> The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the criterion of political debts. The importance of the governmental

> interest in preventing this occurrence has never been doubted (435 U.S. 765 [1978]).

The Court does not concern itself with intentions here, but it does concern itself with the general problem of political debts. What differentiates "political debts" from monetary debts? What differentiates "political debts" to corporations or wealthy constituents from the typical political need to appease enough groups to ensure one's election or reelection? One assumes the problem here is the overinfluence of money in the public arena, the danger that moneyed constituents would be overrepresented and thus that other constituents would have less influence over policy making.[9] This is the "corrupting" danger which the Court hopes contribution limits can control.

The Court's concern here is to successfully trade off political activity and the need to avoid corruption. Corruption appears, therefore, to be a very significant category. While goals like increasing the power of individuals in government or redistributing political power are not perceived by the Court as

---

[9] "Self-government (argued the court) implies a relative equality of status between those whom speak to the public on matters of policy; if the wealthy have special access to decision-makers, the premise of equality is compromised." "Buckley v Valeo: The Special Nature of Political Speech", Daniel Polsby, Supreme Court Review, 1976.

compelling enough to impinge on First Amendment rights, preventing corruption or the appearance of corruption was enough to permit at least a limitation on rights of association. This view of corruption -- of a problem large enough to admit of some trade-offs in the sphere of First Amendment rights -- has remained central to several cases which have followed Buckley.

Does Buckley successfully walk the line which concerned Cain, the division between the usual "bribery" of the political process and relationships which are too inegalitarian? Daniel Polsby, in his 1976 article "Buckley v. Valeo: The Special Nature of Political Speech" thought so. Polsby is not wholly pleased with the Court's performance, sometimes finding that at times it is too "political", too willing to sidestep central questions about the role of particular groups' abilities to express their interests in the public sphere.[10] Nonetheless, he accepts the Court's division between contributions and expenditures, between rights which can be

---

[10] "The Court's argument here avoids rather than grapples with the basic issue. The suggestion is that a ban on independent expenditures on behalf of a candidate fails for want of an adequate government interest, because candidates will not really be grateful for money independently spent to promote their candidacies. This seems a dubious conclusion. The more basic question is whether Congress can ban gratitude-producing behavior simply because it may result in certain persons having more influence than their aliquot share of the electoral total would theoretically give them."

abridged in order to avoid the corruption of undue influence and rights which are too firmly grounded in political speech to be available for that sort of trade-off:

> Contribution and expenditure limits focus on quite different legislative purposes. Limiting contributions is meant to keep very wealthy contributors from acquiring too much influence with and regard from elective politicians. Expenditure ceilings are meant to promote political equality among candidates by equalizing the amount of money each may spend in pursuit of election. The former restrictions are not aimed at a speech interest, nor do they necessarily or logically require that political speech will be diminished in quality or quantity in any political campaign. But expenditure limits are undeniably aimed at speech.

Polsby goes on to applaud the Court's unwillingness to permit any sort of social goal to restrict the individual exercise of First Amendment rights to political speech.

Political speech, then, appears to be one of the defining elements of the "pure" model of American politics that we need to keep in mind in order to grasp a working definition of political corruption. One of the concerns I stated at the start of this essay was that vague definitions of corruption could result attempted "reforms" which impinged on legitimate political activity rather that resolving deviations from that activity. Bruce Cain helped to illustrate the degree to which the difference between the

pluralist process of interactive group bargaining and "bribery" was better defined by a contextual appraisal of the debate on political equity than on essential differences between the two. The Court distinguished that difference by separating certain political activities -- speech-related activities -- from the field of acceptable bargains. Beyond a concept of the "knowing and willing" swapping of money for legislative favors, the Court seems to move toward a concept of "political debts". Does the concept of "political debts" help us to define or reform "political corruption"? How do we define "political debts"?

According to the cases related to what some term "the new corruption", we define "political debts" as undue corporate influence. In FEC v. Massachusetts Citizens for Life, Inc., Justice Brennan distinguished non-profit organizations from profit-seeking corporations by mentioning the concern in case history with the danger to the political process created by the large amounts of wealth which could be commanded by the latter sort of organization. Brennan perceived a threat in corporate political contributions because the "resources in the treasury of a business corporation ... are not an indication of popular support for the corporation's political ideas" (479 U.S. 258).

In Austin v. Michigan Chamber of Commerce (1990) the concept of "political debts" goes far beyond the direct "knowing and willing" relationship which we have seen so far. Corruption here is conceived of as a broad threat to the Madisonian model of republican government, the outcome of profit-seeking corporations interacting with elected officials in the public realm, specifically through independent expenditures. Justice Marshall describes this "new" definition of corruption:

> ...Michigan's regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas (110 S. Ct. 1397).

If we agree that the "falling away" involved in political corruption is a decay in the ability of groups to interact in the public sphere, can we see that definition at work in a situation where one group has a disproportionate access to that sphere?

Justice Scalia thought not. He sees the decision in Austin as a direct (and unwise) refutation of the theory behind Buckley. The latter had held that, despite the somewhat vague threat of "political debt", certain political acts -- speech acts -- were too firmly a part of our constitutional tradition (ie that which we are

concerned with maintaining against decay) to sacrifice to a desire to control for corruption. The idea of restricting speech -- in the form of expenditures -- for the goal of reform was declared "wholly foreign to the First Amendment" (Buckley: 424 U.S. 49). According to Scalia, Michigan's attempts to redress corruption arising from the "veried distribution of property" was such a restriction.

> The Court's opinion ultimately rests upon that proposition whose violation constitutes the New Corruption: expenditures must "reflect actual public support for the political ideas espoused". This illiberal free-speech principle of "one man, one minute" was proposed and soundly rejected in Buckley (110 S. Ct. 1411).

Indeed, one is hard-pressed to imagine the ways in which a "non-corrupt" system could control for certain groups having more bargaining power than others. What if public opinion changes over time? Will all iniquities in bargaining groups have to be evened out, or merely those that affect groups with money? On the other hand, if Marshall's vision of dangerous "political indebtedness" is too vague, how should we define it? And if large aggregations of wealth do allow certain groups persistently greater access to elected officials, are those groups occupying positions in the political arena which other groups are therefore barred from? Is

there anyway to correct for the corrupting influence of the "verious and unequal distribution of property" that Madison described in the Federalist Papers without sacrificing the model of governance which we wish to preserve from corruption?

Polsby points out that although certain groups do have more access, they do not necessarily have any more power over policy formation. If he is right in asserting that "Evidence that politicians are regularly bought by malefactors of great wealth is hard to come by. But there is plainly an enormous amount of shopping going on" should we be concerned? If we could demonstrate control of the political arena by groups with large aggregations of wealth, "corruption" could be said to pose a real, and vividly defined, threat, and we could go about the business of correcting for it. If we cannot, is there any way for us to distinguish the corporate activity which concerned Justices Brennan and Marshall from the traditional "steady appeasement of small groups" which Dahl described?

Lowenstein argues that we can, and that the distinguishing category lies in the nature of the political system itself. Marshall presented a situation in which large aggregations of money create a general atmosphere of corrupting political indebtedness. The traditional system itself (whose legitimacy he was concerned

with in "Political Bribery") seems part and parcel of corrupting influence.

> ...[T]o say that the campaign contributions "taint" the legislative process is to use the language with precision. It is not that the entire legislative process or even a great deal of it is corrupt; rather, it is that the corrupt element is intermingled with the entire process, in a way that cannot be isolated ... There was no meeting behind closed doors or otherwise, not even a moment in a single legislator's mind, in which a decision was made either to succumb to the contributors or not to succumb. The pressure from the contributors is simply part of the mix of considerations out of which a position evolves (Lowenstein, Hofstra Law Review, [1989], p. 324).

Lowenstein is unclear as to why a dominant characteristic of American politics (a mix of opposing interests influencing a variety of elected officials in different ways) should be described as corrupt. "Taint" actually seems like an imprecise use of language when it collapses "the entire process" and "the root of all evil"; what, after all, is being corrupted if the model itself is rife with corruption? What model of purity is Lowenstein using? He writes that "special interest contributions" are a "necessary evil" which, therefore, underscores the need for a reform of the system itself.[11] If he is so radically dissatisfied with the system

---

[11] ibid., p.329: "The evil is necessary within the existing campaign finance system, but the existence of the evil

per se, though, what are the reforms to aim for? And by what standard is the "evil" actually corrupt?

Lowenstein's reform proposal tells us what model he would like to implement if not what standard our current system has fallen away from. He recommends public financing of elections through the mediation of congressional party leadership coupled to an "aggregate limit on (relatively) unrestricted contributions". Party leaders could make fiscal and electoral decisions with an eye toward the health of the party. This would not necessarily hurt the chances of incumbents, but by moving away from candidate-centered politics it could decrease the access points for monied interests.[12] In the case of the aggregate limits, "[i]n plain English, the hope is that the candidate will not feel overly indebted to the special interest contributor if there are dozens more lined up outside the door, ready to contribute in case the first contributor becomes dissatisfied" (Lowenstein 1989, p. 354).

Briefly then, Lowenstein hopes to shift the advantage in our system to elected officials and parties and away from private groups with large aggregations of wealth. One might certainly

---

provides a compelling reason for reforming that system."

[12] It would decrease points of access for a variety of interests, one might imagine.

agree that a move away from candidate-centered politics and toward stronger parties would be to the benefit of the pluralistic system which Dahl described; one could even agree that relatively recent events have marked a falling away from that system.[13] Lowenstein does not list a concern with coalition-building or even pluralist bargaining among his reasons, however. He hopes to provide a system which will be sufficiently competitive to allow "voters [to] change the direction of policy by replacing elected officials".[14] His concern with corruption comes down to increased demands for a kind of equity, for the ability of the individual voter to

---

[13] See in particular Nelson W. Polsby's Consequences of Party Reform, passim, but especially pp. 64-66: "As the Democrats learned in 1972, candidates must behave differently in a presidential nominating process dominated by primary elections than one in which primaries play a smaller part. Rather than build coalitions, they must mobilize factions ... A political faction is easy enough to define: it is a group acting through a political party in pursuit of a common interest ... Coalitions are less fundamental structures than factions, in that they are alliances among groups organized for the purpose of achieving goals common to their constituent parts ... American political parties organize Congress and almost all the state legislators, bring voters to the polls, and make nominations for the Presidency. Where party organizations are strong, coalition-building flourishes; where they are weak, the politics of factional rivalry prevails."

[14] Lowenstein is actually quoting Gary Jacobson here, on p. 364 of "Root of All Evil".

influence policy. Can we define a deviation from this standard as "corruption" of the American political tradition?

There are a variety of critiques of Lowenstein's recommendations. Gary Jacobson and Sanford Levinson both base their criticism on the "sheer implausibility of [the plan's] adoption".[15] Assuming for the moment that Jacobson and Levinson are correct in their point, the political implausibility of a plan to cleanse the political system is a telling problem. Unless one agrees that the political system is intrinsically "tainted", in which case only a radical reform will do, the implementation of a plan which cannot garner support in the political realm does not seem likely to restore the system to its pre-corruption state. If it deviates from the political norm, how can it restore its "purity"? Martin Shapiro, meanwhile, is more concerned with non-negotiables in the attempt to redress inequities in entrance to the public realm. He complains that Lowenstein is ignoring the central problem of reform, the unfair encroachments on individual rights begun, he asserts, in Buckley (Shapiro, Hofstra Law Review [1989],

---

[15] "Electoral Regulation: Some Comments", Sanford Levinson, Hofstra Law Review (1989), 411, 414. Also "Campaign Finance and Democratic Control: Comments on Gottlieb and Lowenstein's Papers", Gary Jacobson, Hofstra Law Review (1989), 369, 380-382.

pp. 385, 389-391). Shapiro's critique also raises questions about the dangers of attacking central political traditions in order to reform contingent examples of corruption.[16]

In order to effectively define corruption, we must have a sense of what it is that has been corrupted. I have been attempting to use Madison's picture of republican government and Dahl's description of "the steady appeasement of relatively small groups" in a situation wherein "control over decisions is unevenly distributed." Under such a definition, the ability of one group to use a particular advantage to exercise consistent control to the extent where other constituent groups can be ignored would constitute "corruption" under this model. The ability of certain groups to provide vast sums in the form of contributions may suggest solely "access" to elected officials, but it does raise

---

[16] Again, if the problems of corruption are endemic and not contingent than the model itself needs to be reconsidered. As Machiavelli wrote in the Discourses, all republics change over time and "those changes are beneficial that bring them back to their original principles." (Book III, Chapter 1). The problem here, of course, is the debate over which original principles shall take precedence, the desire for (relatively) equal presence in the public realm or the removal of political speech freedoms from the realm of what can be negotiated in that realm. It is interesting to note, however, that Machiavelli, too, stresses the usefulness of "a law, that obliges the citizens of the association often to render an account of their conduct" as a remedy for decay of original principles.

questions about the ability of other groups without such advantages to also have access. This does necessarily constitute "corruption" but it does raise concerns of political equity which may point to corruption, or at the very least to the "appearance of corruption".

Current electoral language about corruption clearly misses the point here. Michael Huffington and Ross Perot's assertion that the people need to take the system back from special interests overlooks the central role of organized interests in the political model that is supposed to be rescued. Newt Gingrich's definition of corruption as a system in which the President bargains with special interests and the Legislative branch of government sounds remarkably like the system described by Madison. In order to effectively consider reform of corruption under this definition, we must, to paraphrase Bruce Cain, decide which forms of politics are corrupt and which are not. One could envision a more radical model, or could question the legitimacy of the American political tradition. If one does, however, that should be clear. A definition of corruption requires a model of non-corruption; for the former to be clear, the latter must be also.

In order to put these definitions in clear relief, I will now turn to what many consider a clear example of political corruption: political machines. William Riordan's Plunkitt of Tammany Hall

seems like a textbook example of illegitimate activity disguised as political action. Plunkitt's discourse on "honest graft" or his query "what's the constitution among friends?" exemplify the attitude which turn-of-the-century reformers were aiming to eradicate. At other times, however, Plunkitt cogently refers to political action which clearly represents legitimate American political activity. For example, in "How to Become a Statesman", Plunkitt describes the reliance of the machines on votes and on the ability of politicians to mobilize those votes.[17] In "The Curse of Civil Service Reform", a direct connection is drawn between the ability of political parties to provide service for their constituencies and the strength of patriotic feeling (Plunkitt, esp. pp. 11-16). Plunkitt stresses the necessity of actors in the American political system providing equally for constituencies, appeasing as many groups as possible to ensure stability and popularity.[18] Plunkitt overstates the facts; only a certain number

---

[17] Plunkitt of Tammany Hall, William Riordan. EP Dutton 1963. See esp. p. 10.

[18] ibid, p. 47-48: "So you see, I've got to be several sorts of a man in a single day, a lightnin' change artist, so to speak. But I am one sort of man always, in one respect: I stick to my friends high and low, do them a good turn whenever I get a chance, and hunt up all the jobs going for my constituents." See also pp. 90-98.

of votes need to be mobilized and there is a point of diminishing returns. Nonetheless, he is characterizing pluralist political action as we have defined it. Can we draw a line through Tammany's activities, distinguishing "corrupt" from legitimate bargain making?

A point of contrast here will be useful. California politics have been greatly influenced by Progressive reformers, with an eye towards avoiding the sort of political machine activity exemplified by Tammany. California has also had a political boss, however, but a boss without a party. From the late 1920s until the early 1950s, Arthur Samish was California's premier political boss, with enormous influence over matters in the state legislature having to do with his "constituents". Since Samish was a lobbyist, his constituents were actually clients, businesses or groups of businesses that could afford his services.

> That was to be the pattern for my future career as a lobbyist. First, organize the interest group and convince the members to contribute funds for their own interests. Then, spend the money wisely to elect those who would be friendly to those interests.[19]

---

[19] The Secret Boss of California; The Life and High Times of Art Samish, Arthur Samish and Bob Thomas, Crown, 1971. p. 32. See also pp. 34-35: "Select and Elect. That was all. I simply selected those men I thought would be friendly to my clients' interests. Then I saw to it that those men got elected to the

This is hardly peculiar, but in California it was particularly pernicious. Rather than an uneven appeasement of a large number of small groups in the public realm, one group -- Samish's client list -- had an almost virtual guarantee of being "effectively heard". To put it another way, large aggregations of wealth (wisely spent) preempted the model functioning of the public sphere.

The political situation that made a boss like Samish, one who is not tied to party and therefore not answerable to any constituent body, possible was created by attempts to reform genuine corruption -- the power of the Southern Pacific Railroad -- without having a clear idea of the Madisonian ideal that was supposed to be protected. California Progressives at the turn of the century succeeded in passing a number of measures to weaken the Governor and the political parties in order to dismantle Tammany-style machines which the railroad could use to obtain favorable

---

legislature ... In that way I made certain that the bills I wanted for my clients won a friendly reception in the legislature. Sometimes an assemblyman or a senator might have disappointed me. Maybe he voted the wrong way ... I did my best to see that he didn't return to the legislature after the next election. And most times I was successful in that endeavor ... I didn't care whether a man was a Republican or a Democrat or a Prohibitionist ... All I cared about was how he voted on legislation affecting my clients.

"That was my job. I was being paid ... to protect the interests of my clients. And I did so to the best of my ability."

legislation. "With party discipline at a minimum, a vacuum had been created at Sacramento which had to be filled...".[20] To reform the corruption of representative bodies, the Progressives weakened them. Without a clear definition of the model they were trying to preserve, the Progressives cleared the way for a boss answerable only to paying clients to gain sway over the California legislature.

Steven Erie does an excellent job of distinguishing politics from corruption in his discussion of the fate of Irish political machines in the 1970s.

> Electoral calculations hinged on a manageable vote, not necessarily a large one. Party-sponsored naturalization and registration of the immigrants atrophied. Machine politicians used repression and corruption to discourage immigrant labor party opponents ... Only in competitive-party cities such as Chicago in the 1920s would the Irish politicos work tirelessly to help the new immigrants surmount the hurdles of naturalization, registration, and voting (Erie 1988, p. 219).

The latter model, although describing a system which was famous for instances with deviated from the norm, provides a relatively close approximation of the American political model. Erie uses the term "corruption" to describe situations in which party officials and

---

[20] Carey McWilliams, quoted in Secret Boss, p. 31.

elected politicians bar particular groups from the political arena, situations which clearly deviate from the Madisonian model. Under this rubric, cases like Austin would be harder to prove, but in order for reform to counteract political corruption without encroaching on legitimate political activity, we must have a more precise idea of what "corrupt" actually means. As Austin, Buckley, and some of the other cases I've looked at demonstrate, this is no easy task. Our model of non-corruption is not monolithic, and the attempt to, for example, prevent the control of the public arena by large agglomerations of wealth must navigate issues of free speech and association. Both goals are part of the American political tradition, although one might question the degree to which the latter are absolute if large numbers of small groups are incapable of being effectively heard in the public arena where such speech and association are meaningful. But as the case of Art Samish demonstrates, any attempts to reform corruption also must operate on a clear understanding of the Madisonian model which they are designed to preserve. That this does not happen in electoral rhetoric is hardly surprising, but it must occur in legislation and jurisprudence. We must think clearly and consistently about the terms and models we are using if the public arena we wish to preserve is to withstand the attempts to rescue it.